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No.
COA No. 57463-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GANTRY LOMONE MATTHEWS,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Sharon S. Armstrong

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER	1
B. COURT OF APPEALS DECISION.....	1
C. ISSUES PRESENTED FOR REVIEW	1
D. STATEMENT OF THE CASE	3
E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED.....	6
1. OFFICER O'KEEFE'S INTENTIONAL VIOLATION OF THE <i>IN LIMINE</i> ORDERS RENDERED MR. MATTHEWS'S TRIAL FUNDAMENTALLY AND CONSTITUTIONALLY UNFAIR.....	6
2. THIS COURT'S DECISION IN <i>ANDRESS</i> DOES NOT JUSTIFY A FINDING OF EXTRAORDINARY CIRCUMSTANCES THUS INVOKING THE ENDS OF JUSTICE EXCEPTION TO THE MANDATORY JOINDER RULE.....	8
3. THE JURY'S VERDICT THAT THE DEATH OF MR. VILLAROSA WAS CAUSED BY AN INTENTIONAL ACT OF MR. MATTHEWS WAS UNSUPPORTED BY THE EVIDENCE	12
F. CONCLUSION	14

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const amend. XIV6, 12

FEDERAL CASES

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147
L.Ed.2d 435 (2000)13

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368
(1970)13

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560
(1979)13

Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78
(1982)7

WASHINGTON CASES

In re the Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d
981 (2002)8, 11

State v. Anderson, 96 Wn.2d 739, 638 P.2d 1205 (1982)8

State v. Condon, 72 Wn.App. 638, 865 P.2d 521 (1993)7

State v. Dallas, 126 Wn.2d 324, 892 P.2d 1082 (1995)8, 9

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984)6

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)12

State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983)13

State v. Ramos, 124 Wn.App. 334, 101 P.3d 872 (2004).....9, 10

State v. Russell, 101 Wn.2d 349, 678 P.2d 332 (1984).....11

State v. Taylor, 60 Wn.2d 32, 371 P.2d 617 (1962)6, 7

<i>State v. Watkins</i> , 61 Wn.App. 552, 811 P.2d 953 (1991)	10
<i>Storey v. Storey</i> , 21 Wn.App. 370, 585 P.2d 183 (1978), <i>review denied</i> , 91 Wn.2d 1017 (1979)	7
OTHER STATE CASES	
<i>Wright v. State</i> , 325 P.2d 1089 (Ok.Crim.App. 1958)	7
STATUTES	
RCW 9A.08.010	13
RCW 9A.32.050	12
RULES	
CrR 4.3.1	8

A. IDENTITY OF PETITIONER

Gantry Matthews asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals unpublished decision in *State v. Gantry Matthews*, No. 57463-9-I (June 11, 2007). A copy of the decision is in the Appendix at pages A-1 to A-11.

C. ISSUES PRESENTED FOR REVIEW

1. The Due Process Clauses of the United States and Washington Constitutions require that a defendant be afforded a fair trial. Intentional misconduct by a witness is grounds for reversal of the defendant's conviction where the misconduct results in prejudice so substantial that a jury instruction admonishing the jury to disregard the testimony of the witness is insufficient to cleanse the taint. Must Mr. Matthews' conviction be reversed where Officer O'Keefe intentionally offered that his investigation began by looking through booking photographs thus violating an *in limine* order of the court and injecting into the trial the inference that Mr. Matthews had been arrested and likely convicted on a prior

occasion, such testimony being so prejudicial that the court's admonition to the jury to disregard the remark was insufficient to cleanse the taint?

2. Principles of mandatory joinder and speedy trial require that related offenses be tried together. Second degree intentional murder and felony murder are related offenses for mandatory joinder purposes. Where as here, the State proceeded on intentional murder after Mr. Matthews' conviction for felony murder was overturned, and all the facts which supported the intentional murder prosecution were known at the time the State proceeded on felony murder, do the principles of mandatory joinder and speedy trial bar the State from proceeding?

3. Under the Sixth and Fourteenth Amendments to the United States Constitution, the State bears the burden of proving each element of the charged offense beyond a reasonable doubt. Intent to kill is an essential element of intentional second degree murder. Did the State sustain its burden of proof where it proved only that Mr. Villarosa inexplicably grabbed Mr. Matthews' gun from him, the two struggled mightily, and the gun went off twice during the struggle, fatally wounding Mr. Villarosa?

D. STATEMENT OF THE CASE

After an evening of enjoyment with friends, in the early morning hours of November 30, 1994, Gantry Matthews, his girlfriend, Angela Lambert, and her friend, Tysonia Green, were looking for someplace that was open to get something to eat while driving in Ms. Green's car. 11/8/05RP 77-81; 11/10/05RP140-43. The group ended up at a 7-11 store in the Rainier Beach neighborhood of Seattle. 11/8/05RP 82; 11/10/05RP 143. Mr. Matthews and Ms. Lambert went into the store while Ms. Green waited outside in the car. 11/8/05RP 82-83; 11/10/05RP 144-45.

At some point, Ms. Lambert heard a commotion in the store, and saw Mr. Matthews and one of the clerks in the store, Simeon Villarosa, in a physical struggle with both men's hands on a handgun. 11/8/05RP 86-88. Ms. Lambert went to try to break up the struggle, and at some point heard a gunshot and glass shatter, whereupon she was thrown to the floor. 11/8/05RP 87-90. Ms. Lambert got up and again tried to stop Mr. Matthews and Mr. Villarosa from wrestling, heard a second gunshot and again was thrown to the ground. 11/8/05RP 144-45. Immediately after hearing the second gunshot, Ms. Lambert saw Mr. Villarosa flying backwards and falling to the floor. 11/8/05RP 145-47. Mr.

Matthews and Ms. Lambert immediately left the store, entered Ms. Green's car and fled. 11/8/05RP 148. According to Ms. Green, as the car left the 7-11 store parking lot, Ms. Lambert was hysterical, repeatedly asking Mr. Matthews why he shot Mr. Villarosa.

11/10/05RP 146. According to Ms. Green, Mr. Matthews allegedly stated because he, Mr. Matthews, was a gangster. 11/10/05RP 146.

Alisa Binongal, the other clerk in the 7-11 store with Mr. Villarosa initially heard Mr. Villarosa say "no, no, no" and ordered her to call the police. 11/9/05RP 15. Ms. Binongal saw Mr. Matthews and Mr. Villarosa struggling over a handgun, then heard a gunshot. 11/9/05RP 16. She immediately fled to the backroom and did not see what transpired after the first gunshot. 11/8/9/05 16.

Mr. Matthews testified he was carrying a handgun in the pocket of his leather jacket when he entered the 7-11 store. 11/14/05RP 89-90. As he was shopping for something to eat, he saw Mr. Villarosa mopping the floor. 11/14/05RP 101. As Mr. Matthews was looking at some sandwiches, Mr. Villarosa attempted to pull the handgun from Mr. Matthews' jacket, and ordered Ms. Binongal to call the police. 11/14/05RP 104. Mr. Matthews and Mr.

Villarosa continued to struggle over the gun, a struggle Mr. Matthews described as an "all out struggle." 11/14/05RP 105. At one point Mr. Matthews slipped and began to fall when the gun fired. 11/14/05RP 108-09. The two continued to struggle over the gun until the gun fired again, fatally injuring Mr. Villarosa. 11/14/05RP 111. Ms. Lambert helped Mr. Matthews to his feet and the two fled. 11/14/05RP 113. Mr. Matthews was adamant that he did not intentionally shoot the gun at Mr. Villarosa either time the gun went off. 11/14/05RP 118, 135.

Mr. Matthews was subsequently charged with, and convicted of, second degree intentional murder.¹ CP 106, 186.

The Court of Appeals rejected Mr. Matthews's issues on appeal, finding the detective's violation of the *in limine* orders were not so serious as to render the trial unfair, the ends of justice exception to the mandatory joinder rule applied thus retrial was not barred, and there was sufficient evidence to support the jury's finding Mr. Matthews intended to kill the victim.

¹ Mr. Matthews was originally charged and convicted of second degree felony murder based upon the commission of an assault. CP 4, 23-26. His conviction was overturned and remanded to the trial court. CP 23-26. He was charged with second degree intentional murder. CP 27. The first retrial ended with the jury deadlocked and the court declaring a mistrial.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. OFFICER O'KEEFE'S INTENTIONAL VIOLATION OF THE *IN LIMINE* ORDERS RENDERED MR. MATTHEWS'S TRIAL FUNDAMENTALLY AND CONSTITUTIONALLY UNFAIR

A witness's misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

It has been recognized that witness' misconduct can require a new trial. *State v. Taylor*, 60 Wn.2d 32, 371 P.2d 617 (1962). Witness misconduct generally entails a witness providing intentionally inadmissible and unsolicited testimony or engaging in extraordinary conduct likely to prejudice the trier of fact. See *Taylor*, 60 Wn.2d at (witness intentionally injected impermissible

testimony); *Storey v. Storey*, 21 Wn.App. 370, 585 P.2d 183 (1978), review denied, 91 Wn.2d 1017 (1979) (witness purposely injected impermissible testimony to influence the jury).

In the case at bar, the police officer injected a highly prejudicial "evidential harpoon," the fact that Mr. Matthews had previously been arrested, and by inference, convicted of offenses. The trial court ruled this act of volunteering this information was intentional by Officer O'Keefe, sustained the defense objection to the prejudicial testimony, and admonished the jury to disregard it. 11/10/05RP 31. But, as this Court in *Taylor* held, such action by the trial court is simply not enough to unring the bell after it has been rung. *Taylor*, 60 Wn.2d at 37-38; *Wright*, 325 P.2d at 1093. The trial court should have granted the defense motion for a mistrial in order to cleanse the taint and begin anew. The court's failure to grant the mistrial in light of the improper, intentional violation of the *in limine* order of the court by Officer O'Keefe "standing alone was indeed grounds for reversal." *Wright v. State*, 325 P.2d 1089, 1093 (Ok.Crim.App. 1958).

The Court of Appeals' reliance on *State v. Condon*, 72 Wn.App. 638, 865 P.2d 521 (1993) misses the point. The major difference between *Condon* and Mr. Matthews's matters is that in

Condon the comment was inadvertent where here the comment was intentional and made with the intent to paint Mr. Matthews in as bad a light as possible in front of the jury.

This Court should grant review, reverse Mr. Matthews' conviction and remand so he has the opportunity to be given a fair trial.

2. THIS COURT'S DECISION IN *ANDRESS* DOES NOT JUSTIFY A FINDING OF EXTRAORDINARY CIRCUMSTANCES THUS INVOKING THE ENDS OF JUSTICE EXCEPTION TO THE MANDATORY JOINDER RULE

Akin to the rules prohibiting successive prosecutions for the same offense, Washington bars prosecution for a "related offense" not joined in the original information. *State v. Dallas*, 126 Wn.2d 324, 328-29, 892 P.2d 1082 (1995); *State v. Anderson*, 96 Wn.2d 739, 741, 638 P.2d 1205 (1982); CrR 4.3.1(b)(1). When two offenses are based on the same conduct, they must be joined in the first prosecution. *Anderson*, 96 Wn.2d at 741; CrR 4.3.1(b).

The Court of Appeals ruled that this Court's decision in *In re the Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), was "truly unusual circumstances," and the "ends of justice" exception to the mandatory joinder rule applied, following its

decision in *State v. Ramos*, 124 Wn.App. 334, 101 P.3d 872 (2004).² Decision at 7-8.

To invoke the “ends of justice” exception to the mandatory joinder rule, the State must show there exists “extraordinary circumstances” warranting its application. *Dallas*, 126 Wn.2d at 333. The extraordinary circumstances used to invoke the “ends of justice” exception, “must involve reasons which are extraneous to the action of the court or go to the regularity of its proceedings.” *Carter*, 56 Wn.App. at 333. Here, extraordinary circumstances did not exist, thus the exception did not apply.

In *Ramos*, Mr. Ramos and Mr. Medina were convicted of second degree felony murder and this Court vacated their convictions pursuant to *Andress*. *Ramos*, 124 Wn.App. at 335. The Court of Appeals went on to gratuitously determine whether the State was barred from retrying the two defendants for manslaughter on remand. The Court concluded that the mandatory joinder rule did not require *this Court* to dismiss the prosecution at that point, but left it to the trial court to determine whether the ends of justice

² This Court has granted discretionary review in *Ramos* to review the trial court’s pretrial ruling finding the mandatory joinder rule did not bar the State from charging the defendants with first degree manslaughter. *State v. Ramos*, No. 77347-5. Oral argument is tentatively scheduled for September 25, 2007.

exception would be defeated by dismissing manslaughter charges against the two:

Other factors may be relevant to determining the justice of further proceedings, and whether the ends of justice would be defeated by dismissing manslaughter charges against Ramos and Medina is, in the final analysis, *a determination for the trial court*. But we hold the mandatory joinder rule does not require this court to dismiss with prejudice *now*.

Ramos, 124 Wn.App. at 343 (emphasis added). Since the Court only had to reverse Mr. Ramos' conviction and remand to the trial court to determine whether the mandatory joinder rule barred further prosecution, the Court's statements about the applicability of the ends of justice exception was dicta, and thus has no precedential value. *State v. Watkins*, 61 Wn.App. 552, 559, 811 P.2d 953 (1991).

Further, the *Ramos* Court's analysis was based upon an inaccurate view that this Court in *Andress* had engaged in an "about face" repudiation of its earlier decisions upholding assault as a predicate offense for second degree felony murder, which ultimately constituted an extraordinary circumstance allowing the State to circumvent the mandatory joinder rule. *Ramos*, 124 Wn.App. at 342. But, as the *Andress* Court aptly noted:

[T]he court . . . has [n]ever addressed [] the specific language of the amended statute in connection with the argument again advanced in this case. This is not surprising, because the statutorily-based challenges in *Harris*, *Thompson*, and *Wanrow* were brought by defendants convicted under the prior version of the second degree felony murder statute, former RCW 9.48.040. We are thus faced with a change in the language of the statute which has never been specifically analyzed in the context here.

Andress, 147 Wn.2d at 609. Thus, there was no “about face” but merely review of a different challenge to the statute.

Finally, the *Ramos* decision conflicts with this Court’s decision in *State v. Russell*, which held that mandatory joinder barred the State from proceeding on a second degree intentional murder theory following a hung jury on a theory of felony murder. 101 Wn.2d 349, 352-53, 678 P.2d 332 (1984). Since the State here had the evidence to proceed to trial on a theory of intentional murder, as shown by its proof here, it certainly was aware of these facts when it chose to proceed only on a theory of felony murder in 1995. The State necessarily chose to proceed only on the felony murder theory because of the ease of proving that theory as opposed to proving intentional murder. Such a purposeful choice by the State cannot be termed extraordinary circumstances but a

violation of the mandatory joinder rule. This Court should grant review and rule the State was barred from retrying Mr. Matthews.

3. THE JURY'S VERDICT THAT THE DEATH OF
MR. VILLAROSA WAS CAUSED BY AN
INTENTIONAL ACT OF MR. MATTHEWS
WAS UNSUPPORTED BY THE EVIDENCE

In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend 14; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221.

To convict Mr. Matthews of second degree murder, the jury had to find that he shot Mr. Villarosa, that he acted with intent to cause Mr. Villarosa's death, and that Mr. Villarosa died as a result of Mr. Matthews' acts. RCW 9A.32.050(1)(a). Since intent is an

element of second degree murder, the State must prove it beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 495, 656 P.2d 1064 (1983). "A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a).

The testimony at trial, from the only two eyewitnesses to the event other than Mr. Mathews, Ms. Lambert and Ms. Binongal, proved only that Mr. Villarosa and Mr. Mathews for some unknown reason struggled over Mr. Mathews' gun. There was no testimony about how the struggle began, other than Mr. Mathews' testimony that Mr. Villarosa inexplicably grabbed the gun and attempted to wrest it away from Mr. Mathews. 11/14/05RP 105. In addition, there was no testimony as to how the gunshots occurred. Both Ms. Lambert and Ms. Binongal testified they heard shots but were unable to say whether it happened accidentally or whether Mr. Villarosa or Mr. Mathews pulled the trigger. Thus, there was no evidence produced at trial that Mr. Mathews acted with an intent to kill Mr. Villarosa. At best, the evidence showed Mr. Mathews was carrying a gun for his safety, Mr. Mathews and Mr. Villarosa somehow struggled over the gun for an unknown reason, and Mr. Villarosa was killed when the gun somehow went off twice. There

simply was no evidence from which the jury could conclude that Mr. Matthews acted with the intent to kill Mr. Villarosa. This Court should grant review and reverse Mr. Matthews's conviction finding the State failed to prove intent to kill.

F. CONCLUSION

For the reasons stated, this Court should grant review and reverse Mr. Matthews's conviction.

DATED this 9th day of July 2007.

Respectfully submitted,



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APPENDIX A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	No. 57463-9-I
)	
Respondent,)	
)	UNPUBLISHED OPINION
)	
v.)	
)	
GANTRY MATHEWS,)	
)	
Appellant.)	
		FILED: <u>June 11, 2007</u>

PER CURIAM — Gantry Mathews was charged and convicted of intentional second degree murder after his conviction for felony murder was vacated. Mathews appeals, raising issues of witness misconduct violating his right to a fair trial, violation of mandatory joinder and speedy trial rules, estoppel, and sufficiency of the evidence. We affirm.

FACTS

In the early morning of November 30, 1994 Gantry Mathews, Tysonia Green, and Mathews' girlfriend, Andrea Lambert, went to a convenience store in Seattle. Alisa Binongal and Simeon Villarosa were working at the store. While Mathews and Lambert were in the store, Binongal heard Villarosa cry out "no, no, friend, no," before yelling at her to call 911. Binongal saw Mathews with a gun in

his hand. After Villarosa grabbed Mathews' wrist, he and Mathews struggled over the gun. During the struggle, Mathews shot Villarosa, first in the hand and then in the back, killing him.

A jury convicted Mathews of felony murder with second degree assault as the predicate crime. After the Washington State Supreme Court decisions in In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), and In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), this court granted Mathews' personal restraint petition, vacated his conviction, and remanded.

On remand, the State charged Mathews with second degree intentional murder. The trial court rejected Mathews' motion to dismiss on grounds of mandatory joinder, speedy trial, and due process. During trial, the court denied Mathews' motion for a mistrial based on witness misconduct. The jury convicted Mathews of second degree intentional murder. Mathews appeals.

WITNESS MISCONDUCT

Mathews contends the trial court erred in denying the motion for mistrial after Detective Kevin O'Keefe intentionally referred to evidence excluded by the trial court. Mathews asserts Detective O'Keefe's misconduct was so prejudicial that it denied him a fair trial.

We review a trial court's ruling on a motion for mistrial for abuse of

discretion. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002), citing State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial. See State v. Post, 59 Wn. App. 389, 395, 797 P.2d 1160 (1990), aff'd, 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992). In determining whether a trial irregularity deprived a defendant of a fair trial, the reviewing court should examine the following factors: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993).

The trial court granted Mathews' motion to exclude evidence of his prior convictions and a photograph of Lambert sitting on his lap at the police station. In response to a question on cross examination about when the police first learned Mathews' full name, Detective O'Keefe said "[w]e interviewed Tysonia Green, she gave us the name of Gantry Mathews. The detective started working on the name from the picture on King County booking file." Defense counsel immediately moved to strike. The trial court granted the motion to strike as nonresponsive and ordered the jury to disregard it. During redirect, the prosecutor asked Detective O'Keefe about a period of time when Lambert was in the room with Mathews at the police station. In response, Detective O'Keefe said:

Well, she was being fingerprinted and brought to the room.

We brought her inside, Detective Lima and I were in the same room and she sat down on his lap. They talked.

Defense counsel immediately objected and moved to strike. The trial court sustained the objection, stating "[t]he way in which she sat down is irrelevant, stricken, and the jury will disregard it."

After Detective O'Keefe testified, defense counsel moved for a mistrial arguing that the two statements violated the court's order excluding evidence of Mathews' prior arrests and the photograph of Lambert sitting on Mathews' lap at the police station. The trial court expressed concern that Detective O'Keefe had intentionally violated the orders, but questioned whether the statements were so prejudicial as to deny Mathews a fair trial. The trial court deferred ruling on the motion for mistrial until all the evidence was presented, stating:

The only question in my mind is whether the jury, knowing that the defendant had prior booking photos, i.e., booking photo taken at the jail from previous arrests, means that he cannot have a fair trial and I'm going to essentially hold the motion in abeyance and see if there is anything that adds to the problem.

At the end of the trial, the court denied Mathews' motion for a mistrial.

Mathews likens this case to State v. Taylor, 60 Wn.2d 32, 371 P.2d 617 (1962), Wright v. State, 325 P.2d 1089 (Ok. Crim. App. 1958), and State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968). In Taylor, the investigating police officer stated that he contacted Taylor's parole officer and then repeated this statement after the trial court denied defense counsel's motion for a mistrial. The

Washington State Supreme Court affirmed the trial court's decision to grant a new trial because the police officer witness intentionally injected prejudicial information for a second time. In the opinion, the Taylor court characterized the misconduct as "an evidential harpoon which would only be aggravated by an instruction to disregard." Taylor, 60 Wn.2d at 37. In Wright, a state narcotics agent testified that the defendant admitted that he had served four terms in the penitentiary. Wright, 325 P.2d at 1091. The court noted that the only purpose for interjecting evidence of a prior conviction was to impugn the defendant's credibility, and ruled that the "voluntary interjection of such evidence was highly prejudicial and though the court sustained the objection and admonished the jury not to consider it, the bell could not be unring." Wright, 325 P.2d at 1093. And in Miles, when a police officer testified that he received a teletype from Grandview that the defendant was coming to Spokane to duplicate a robbery he committed there, the Washington State Supreme Court concluded that this testimony was so prejudicial that an instruction could not cure it. Miles, 73 Wn.2d at 68, 71.

But unlike the direct and pointed references to the defendant's prior convictions and crimes in Taylor, Wright, and Miles, we conclude that this case is more like Condon, where the reference to a prior conviction was ambiguous at best. In Condon, a witness stated that the defendant called her when he got out

of jail and that he asked her to pick him up from the jail. On appeal, the court stated that

[t]he mere fact that someone has been in jail does not indicate a propensity to commit murder, and the jury just as easily could have concluded that Condon was in jail for a minor offense. Also, the fact that someone has been in jail does not necessarily mean that he or she has been convicted of a crime. Thus, although the remarks may have had the potential for prejudice, they were not so serious as to warrant a mistrial, and the [trial] court's instructions to disregard the statements were sufficient to alleviate any prejudice that may have resulted.

Condon, 72 Wn. App. at 649-50.

As in Condon, the reference to the booking file in this case does not necessarily indicate that Mathews had ever been convicted. And there was no indication that if Mathews had been convicted of a crime in the past, the crime was the same or similar to the one in this case. Further, counsel changed the focus of questioning after the trial court sustained the objections. And the reference to Lambert sitting on Matthew's lap created minimal prejudice. Lambert was identified as Matthews' girlfriend and the jury knew that the police questioned both Lambert and Matthews at the police station. The trial court sustained counsel's immediate objections and instructed the jury to disregard the statements. Although the references were not cumulative because the trial court had ruled such evidence inadmissible, the irregularities were not serious and the trial court's actions in sustaining the objections and instructing the jury to

disregard the evidence cured any prejudice. A jury is presumed to follow the court's instructions. State v. Foster, 135 Wn.2d 441, 472, 957 P.2d 712 (1998).

RETRIAL ON RELATED CRIME

Mandatory Joinder

In his opening brief, Mathews contends that the mandatory joinder and speedy trial rules barred another trial after this court vacated his original conviction based on Andress and Hinton. In his statement of additional grounds for review, Mathews also argues that the State was estopped from charging him with intentional murder because the prosecutor stated during his first trial that the State was not seeking a conviction for intentional murder.

CrR 4.3.1(b)(3) provides:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion ... shall be granted *unless the court determines that ... the ends of justice would be defeated if the motion were granted.* (Emphasis added)

The rationale for the rule is issue preclusion, and the intent was to place a limitation on the prosecutor's ability to file successive prosecutions based on essentially the same conduct. State v. Dallas, 126 Wn.2d 324, 332, 892 P.2d 1082 (1995). But the ends of justice exception allows the State to file a successive charge for a related crime where (1) extraordinary circumstances

exist and (2) the extraordinary circumstances are “extraneous to the action or go to the regularity of the proceedings.” State v. Ramos, 124 Wn. App. 334, 341, 101 P.3d 872 (2004).

Ramos is directly on point in this case. In Ramos, this court concluded that extraordinary circumstances exist in cases affected by the Andress decision. Here as in Ramos, the State “relied on nearly three decades of cases interpreting the statutes defining murder when death occurs in the course of a felony” when it sought a conviction for felony-murder with second degree assault as the predicate crime. Ramos, 124 Wn. App. at 341. Not until Andress did the Washington Supreme Court conclude that “the legislature did not intend assault to serve as the predicate felony for murder.” Ramos, 124 Wn. App. at 342. The decision to abandon an unbroken line of precedent was “highly unusual, and the decision to do so was certainly extraneous to the” case at hand. Ramos, 124 Wn. App. at 342. We conclude that the trial court did not err in finding that the ends of justice would be defeated by application of the mandatory joinder rule.

Speedy Trial

Mathews contends that the speedy trial rule precluded filing additional charges because the speedy trial period “should begin on all crimes ‘based on the same conduct or arising from the same criminal incident’ from the time the defendant is held to answer any charge with respect to that conduct or episode.”

State v. Harris, 130 Wn.2d 35, 44, 921 P.2d 1052 (1996). Matthews argued in the trial court that filing the second information more than ten years after the incident constituted a gross violation of the speedy trial rule.

Generally, CrR 3.3 requires a criminal trial to begin within 60 days after arraignment if the defendant is in custody and 90 days if the defendant is not in custody. CrR 3.3(b)(1), (c)(1). But under CrR 3.3(a)(4), an additional charge is allowed if the trial "was delayed by circumstances not addressed in this rule . . . unless the defendant's constitutional right to a speedy trial was violated." A defendant's constitutional right to a speedy trial is violated when there was an unreasonable delay, taking into account (1) the length of the delay, (2) the reason for the delay, (3) whether and when the defendant asserted the right to a speedy trial, and (4) whether the defendant has been prejudiced. State v. Higley, 78 Wn. App. 172, 185, 902 P.2d 659 (1995).

In this case, Mathews does not claim any violation of his constitutional right to a speedy trial. Nonetheless, given the Andress decision, his constitutional right to a speedy trial was not violated. Under CrR 3.3(a)(4), the new information did not violate the speedy trial rule because the extraordinary circumstances created by Andress placed the case under CrR 3.3(a)(4).

Estoppel

In his statement of additional grounds for review, Mathews contends that

the State is estopped from charging intentional murder. Mathews cites In re Personal Restraint of Peterson, 99 Wn. App. 673, 680, 995 P.2d 83 (2000) for the proposition that “[e]quitable estoppel is based on the principle that: ‘a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.’” He argues that the State had all the facts constituting intentional murder at the time of filing the original information but chose not to charge this crime. In addition, the prosecutor stated at his original trial that the State was not seeking a conviction for intentional murder.

Mathews alleges that in pursuing the intentional murder conviction, the State acted in a manner inconsistent with its prior statement that it was not seeking a conviction on intentional murder. We disagree. At the original trial, the State was not in fact seeking a conviction on intentional murder because it charged Mathews under the felony murder prong, which was valid at that time. After the felony murder prong was ruled invalid in Andress, the State was entitled to charge the intentional murder alternative. There is no inconsistency in filing the new charge where the law allows it. There is no evidence that Mathews relied on the fact that the State only charged the felony murder in the original information. See Peterson, 99 Wn. App. at 680. Estoppel does not apply in this case.

SUFFICIENCY OF THE EVIDENCE

Mathews claims the State failed to present evidence sufficient to support the jury's determination that he intended to kill Villarosa. In a claim of insufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution, to decide whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn. 2d 216, 220-21, 616 P.2d 628 (1980).

A review of the record shows that according to company policy, convenience store clerks were instructed not to intervene in any criminal activity occurring in the store. Villarosa's co-worker heard him saying "no, no, friend, no" just before the struggle over the gun began. These facts indicate that Villarosa did not instigate the incident. The forensic evidence supports the conclusion that Mathews intentionally shot Villarosa. Villarosa was shot in the back and the bullet went through his left lung, heart, aorta and right lung before exiting his body. The gun Mathews used was in working order and required eleven pounds of trigger pull to fire. The State's firearms expert who analyzed the gun testified that the powder pattern was consistent with a distance of four feet between Mathews and Villarosa. The expert also testified that if Villarosa was facing Mathews and the gun accidentally fired, there was not have been enough time for Villarosa to turn around so as to be shot in the back. Green also testified that

No. 57463-9-I/12

after the shooting, Lambert was screaming "why did you shoot him" and Mathews responded "because I'm a gangster." This evidence supports a finding that Mathews intended to kill Villarosa.

CONCLUSION

Affirmed.

FOR THE COURT:

Schindler, A.C.

Baker, J.

Cox, J.

DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the document filed under Court of Appeals No. 57463-9-I to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for ☒ respondent: Andrea Ruth Vitalich - King County Prosecuting Attorney, ☒ appellant and/or ☐ other party, at the regular office or residence or drop-off box at the prosecutor's office.


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 9, 2007

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